ORIGINAL

[redacted]

ML
myers lazrus technology law group
1990 M Street, NW, Suite 200
Washington, DC 20036
(202) 296-0626
Fax: (202) 296-1680
www.myerslazrus.com

Richard S. Myers
Jay N. Lazrus
Also admitted to Maryland
James J. Keller
Consulting Engineer
Writer's e-mail:
myers@myerslazrus.com

June 29, 2001

VIA HAND DELIVERY
Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

Re: **PETROLEUM COMMUNICATIONS, INC.**
Ex Parte Presentation
Gulf of Mexico Cellular Rule Making Proceeding
WT Docket 97-112; CC Docket 90-6

Dear Ms. Salas:

On June 28, 2001, Jay Lazrus, Esq., and undersigned counsel of the law firm Myers Lazrus Technology Law Group, on behalf of Petroleum Communications, Inc., made an oral ex parte presentation concerning the above-referenced proceeding in a meeting with David Furth and Linda Chang of the Wireless Telecommunications Bureau. The topics covered in the presentation are addressed in the enclosed material which was circulated at the meeting. An original and four copies of this letter are being submitted (two for each docket number). Please contact the undersigned should any questions arise regarding this matter.

Very truly yours,

Richard S. Myers

Enclosure

cc (w/o encl.): David Furth
Linda Chang

Petroleum Communications, Inc.'s June 28, 2001 Ex Parte Presentation
Gulf of Mexico Cellular Rule Making Proceeding (WT Docket 97-112)

Land carrier extensions. Alltel's and Verizon's recent filings refer to extensions into Gulf carriers' service areas that might require pull-backs under current rules. Land carriers, however, provide no specific information about the areas where such extensions or other coverage problems exist, except for Mobile Bay where a settlement is in the works. The Commission should request that they report in 120 days the specific areas where problems remain, proposals that have been made to resolve those problems under existing rules (e.g., compensation paid to Gulf carriers, revenue sharing, partitioning, etc.) and the reasons why they cannot be resolved under current rules. This process will take time in the near term, but will save time in the long term by providing the best record on which to base new rules that will withstand appeal.

Title II issues. The Commission adopted a rule, §20.15(a), forbearing from exercising Title II (Section 205) authority with respect to regulating the rates and practices of CMRS licensees. It thus may not exercise that authority directly or indirectly by reducing the area where allegedly "high" rates are charged, for example, by adopting a "neutral" or "coastal" zone. To do so would unlawfully shift the burden to the Gulf carriers to justify their rates contrary to Title II procedures that remain in force without forbearance. Since decisions in this rule making cannot lawfully be based on rate issues, they must be based on other issues such as coverage. This is why the Commission should request the information described above before adopting new rules.

Regulatory Flexibility Act. The Initial Regulatory Flexibility Analysis ("IRFA") of the "coastal zone" proposal did not comply with the Regulatory Flexibility Act.[1] The Commission's IRFA (Second Further NPRM, ¶¶ 64-71) failed to:

- describe the number and classes of small entities affected by the proposed rule
- analyze compliance requirements and identify conflicting rules[2]
- analyze alternatives that minimize the impact on small entities

---

[1]RFA violations are appealable. *See Northwest Mining Assoc. v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998)(remand for procedural violations of RFA); *Southern Offshore Fishing Assoc. v. Daley*, 55 F. Supp. 2d 1336 (M.D. 1999)(Final Regulatory Flexibility Analysis prepared after insufficient notice to small entities in NPRM violated RFA requirements).

[2]For instance, paragraphs 69-72 of the Second Further NPRM contain no discussion or analysis of the 15-day reporting rule proposed in paragraph 47, a proposal that conflicts with Section 1.947 of the rules that contains a 30-day reporting rule.

The Commission (at ¶ 71 of the Second Further NPRM) described the "impact" of the coastal zone on small entities as "the opportunity to provide service" under the proposed rules. Observing that parties will operate under new rules does not describe their impact on them. The Commission concluded there was no need to review alternatives to a "coastal zone" because providing cellular service has a low burden of regulatory compliance. An observation about existing regulatory burdens of an industry in general does not satisfy the RFA. The RFA requires a small entity impact analysis with respect to the agency's proposal and an analysis of alternatives. Instead of performing this analysis, the Commission simply assumed there was no need to examine alternatives based on the assumption of a low compliance burden. However, a "coastal zone" will redefine the Cellular Geographic Service Areas where two small Gulf carriers generate revenues. It will have a significant and adverse economic impact on these carriers. The IRFA should have analyzed this impact and discussed alternatives. For instance, a "coastal zone" will eliminate incentives for land carriers to renew co-location and extension agreements with Gulf carriers that, once expired, will create unserved areas for which land carriers can file applications for areas once served by the Gulf carrier. Merely "grandfathering" the agreements until they expire will not avoid this adverse impact and the erosion of the Gulf carriers' service areas and revenues. Since alternatives exist that avoid this impact while achieving the Commission's goals, the "coastal zone" will not pass a properly performed Final Regulatory Flexibility Analysis ("FRFA") required for its adoption. There has been no IRFA at all of the "neutral zone." A FRFA cannot cure the absence of an IRFA, because there have been no comments on the impact of the "neutral zone" within the framework of analysis required by the RFA. A properly performed FRFA would conclude that the "neutral zone," like the "coastal zone," should not be adopted.

The Commission simply has not obtained the record evidence needed to adopt a "coastal" or "neutral" zone. It has no good idea whether, where and to what extent any coverage gaps actually exist that require "fixing" with new rules. Obtaining the information described above will help ensure RFA compliance by providing a better record about the problems (if any) with current rules, so that the agency can conduct an RFA analysis of the impact of new rules dealing with those problems. As an alternative, the NPRM could be suspended while the Commission issues a Notice of Inquiry to gather information to decide whether to propose new rules at all.

Retroactivity. New rules like the coastal zone would modify the Gulf carriers' individual licenses, impair their vested rights and be impermissibly retroactive. The Section 316 adjudicatory process could avoid this type of retroactivity. *See Chadmoore Communications, Inc. v. F.C.C.*, 113 F.3d 235, 240-241 (D.C. Cir. 1997).

COMMISSION OPTIONS IN GULF CELLULAR RULE MAKING

This table shows why keeping the status quo or adopting the PetroCom/U.S. Cellular proposal are the best options.

Option	Satisfies Court Remand?	Satisfies Other Goals?*	Avoids Title II rate regulation issues?	Easy for FCC to administer?	Avoids Fifth Amendment "takings" issues?	Supported by record evidence?	Avoids RFA issues?		Avoids impermissible retroactive rule making?‡	Avoids Section 316 hearing?‡
							IRFA	FRFA		
Status Quo	Yes	All	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
PetroCom & US Cellular	Yes	All	Yes	Yes	Yes	Yes	No	Yes	Maybe	Maybe
Coastal Zone	No	Some	Question	Maybe	Florida side only?	No	Maybe	No	No	No
Neutral Zone	No	None	No	No	No	No	No	No	No	No

* (1) Reliable, seamless coverage along the coastal waters of the Gulf and adjacent land area; (2) minimize unauthorized subscriber capture; and (3) encourage competition to promote competitive rates.

‡ A new rule is impermissibly retroactive under the Administrative Procedure Act if it impairs vested rights. A Section 316 adjudication to modify the individual licenses of the Gulf carriers would not involve the same retroactivity issues as this rule making. *See Chadmoore Communications, Inc. v. F.C.C.*, 113 F.3d 235, 240-241 (D.C. Cir. 1997). Section 316 procedural requirements (e.g., burdens of proof and proceeding) are vastly different from those of a rule making, and afford Gulf carriers rights they do not have in a rule making.

CONCLUSION: THIS RULE MAKING SIMPLY IS THE *WRONG* PROCESS FOR MODIFYING THE LICENSES OF THE GULF CARRIERS.